



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-00-1

FACTS:

You are the wiring inspector for the Town ("Town"). You also have your own electrical contracting business. You want to perform electrical work, including trouble shooting, repairs, and installation, for Town agencies for compensation.

The Board of Selectmen of the Town voted to adopt St. 1981, c. 809, codified at G.L. c. 166, §32A, entitled "Inspector of wires working as electrician; inspection by assistant inspector":

In a city, town or district which accepts this section, a licensed electrician who is appointed inspector of wires may practice for hire or engage in the business for which licensed under the applicable provisions of chapter one hundred and forty-one while serving as such inspector; provided, however, that within the area over which he has jurisdiction as wiring inspector he shall not exercise any of his powers and duties as such inspector, including those of enforcement officer of the state electrical code, over wiring or electrical work done by himself, his employer, employee or one employed with him. Any such city, town or district may in the manner provided in the preceding section appoint an assistant inspector of wires who shall exercise the duties of inspector of wires, including those of enforcement officer of the state electrical code, over work so done. Said assistant inspector may act in absence or disability of the local inspector and for his services shall receive like compensation as the city, town or district shall determine.

QUESTION:

General Laws c. 268A, §20, applicable to all municipal employees, including a wiring inspector such as yourself, prohibits such employees from having a financial interest in a contract with the same municipality. General Laws c. 166, §32A, a local option statute, permits a wiring inspector, in a town that adopts this statute, to practice for hire or engage in electrical work within his own municipality. Does the Town's adoption of the provisions of the later-enacted G.L. c. 166, §32A effectively repeal the §20 prohibition to allow you to be compensated for electrical work that you perform for Town agencies?

ANSWER:

No, G.L. c. 166, §32A does not expressly or impliedly repeal G.L. c. 268A, §20 as applied to wiring inspectors. Therefore, you are prohibited from being compensated for electrical work you perform for Town agencies, unless you satisfy one of the §20 exemptions.

DISCUSSION:

We begin with the plain language of the two relevant statutes, G.L. c. 268A, §20,^{1/} and c. 166, §32A. G.L. c. 268A, §1(n). and G.L. c. 166, §32A. *Plymouth County Retirement Association v. Commissioner of Public Employee Retirement*, 410 Mass. 307, 309 (1991). G.L. c. 268A, §20, which was enacted in 1962, states, in relevant part, that "[a] municipal employee

who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know, shall be punished," unless he qualifies for one of the enumerated exemptions to the broad prohibition. See G.L. c. 268A, §§20(a) - (h), *et seq.* Under a plain reading of the statutory language, a municipal employee, such as a wiring inspector, may not contract with a town agency to provide electrical services unless he qualifies for one of the §20 exemptions.

G.L. c. 166, §32A, which was enacted in 1981, states that, in a town which accepts the statute, a wiring inspector "may practice for hire or engage in the business for which licensed . . . while serving as such inspector," so long as certain conditions are met. Because this statute does not restrict or qualify the quoted language, a potential conflict exists between this statute and §20 as applied to a wiring inspector performing electrical work for compensation for a town agency in a town that adopts G.L. c. 166, §32A. General Laws c. 268A, §20 prohibits such work absent an exemption, whereas G.L. c. 166, §32A does not appear to forbid such work.

In resolving this potential conflict, we are guided by a longstanding principle of statutory interpretation that "[a] statute is not to be deemed to repeal or supercede a prior statute in whole or in part in the absence of express words to that effect or of clear implication." *Colt v. Fradkin*, 361 Mass. 447, 449-450 (1972), quoting *Cohen v. Price*, 273 Mass. 303, 309 (1930); *LaBranche v. A.J. Lane & Co.*, 404 Mass. 725, 728-729 (1989) ("Implied repeal of a statute is not favored"). With this principle in mind, we examine whether G.L. c. 166, §32A contains express words or a clear implication that it does supercede G.L. c. 268A, §20.

First, G.L. c. 166, §32A contains no express language curtailing or superceding the application of G.L. c. 268A, although two of the five versions of the bill that eventually became the statute did provide such language. See 1981 Senate Doc. No. 903 ("Notwithstanding any provision of law to the contrary"); 1981 Senate Doc. No. 941 ("Notwithstanding any general or special law to the contrary"). The Legislature is presumed to have been aware of G.L. c. 268A, §20 when enacting G.L. c. 166, §32A, as §20 was enacted prior to G.L. c. 166, §32A. Had the Legislature intended G.L. c. 166, §32A to supercede §20, it could have expressly said so. *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 382 Mass. 580, 586 (1981). See, e.g., G.L. c. 111, §26G (a septic system installer who is appointed or elected to the board of health may perform septic system installation work in his own municipality "notwithstanding the provisions of [G.L. c. 268A, §17]"). The absence of such language in G.L. c. 166, §32A is some indication of a Legislative intent not to repeal G.L. c. 268A, §20 as to wiring inspectors. See *Police Department of Boston v. Fedorchuk*, 48 Mass. App. Ct. 543, 546-547 (2000).

In the absence of express words, we will find implied repeal only if a clear implication exists that G.L. c. 166, §32A supercedes G.L. c. 268A, §20. *Rennert v. Board of Trustees of State Colleges*, 363 Mass. 740, 743 (1973). In determining whether the Legislature clearly implied that one statute should supercede another, the court considers the legislative intent, history and purpose of statutes with "unsettled or overlapping borders." *Commonwealth v. Houston*, 430 Mass. 616, 620-625 (2000) (construing potential conflict between application of rape shield statute and statute governing admissibility of prior convictions); *City of Everett v. City of Revere*, 344 Mass. 585, 588-589 (1962).

To make this determination, we begin with an examination of the purpose of G.L. c. 268A, §20. Section 20 has a broad prophylactic purpose. It seeks "to prevent municipal employees from using their positions to obtain contractual benefits or additional appointments

from the municipality and to avoid any public perception that municipal employees have an 'inside track' on such opportunities." See *EC-COI-99-2*; 86-10; 89-32; 95-2 (where the Commission stated that §7, the state counterpart to §20, "seeks to avoid the perception and the actuality of a state employee's enjoying an 'inside track' on state contracts or employment"); W. G. Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U. Law R. 299, 368, 374 (1965); *Quinn v. State Ethics Commission*, 401 Mass. 210, 214 (1987).

Turning to G.L. c. 166, §32A, it appears that the statute was enacted in response to the promulgation, in 1980, of a regulation which imposed a flat prohibition on a wiring inspector's practicing electrical work in the same area over which he had jurisdiction.^{2/} Apparently the regulation created difficulty for small communities seeking to recruit wiring inspectors.^{3/}

General Laws c. 166, §32A contains no words or provisions relating to a wiring inspector's holding a second position with the same town, performing electrical work for, or providing electrical equipment or apparatus to, town agencies. Neither does the statute address the potential for a wiring inspector to have an inside track in obtaining contracts with town agencies. Thus, the statute does not address the core purpose of §20 - the prevention of actual and apparent insider track influence.

Resolving the potential conflict between G.L. c. 166, §32A and G.L. c. 268A, §20 by applying §32A in place of §20 would "impliedly repeal [] a portion of the [Commission's] power" to enforce §20 as to that group of municipal employees who serve as wiring inspectors in towns that adopt the provisions of G.L. c. 166, §32A. *Registrar of Motor Vehicles*, 382 Mass. at 585. Because G.L. c. 166, §32A does not contain express words or a clear implication to repeal G.L. c. 268A, §20 as applied to wiring inspectors, we do not conclude that G.L. c. 166, §32A supercedes or limits the application of G.L. c. 268A, §20. *Commonwealth v. Hayes*, 372 Mass. 505, 511 (1977) ("[i]n the absence of express statutory directive, it seems prudent to avoid a doctrine of implied repeal which might ultimately deprive [the statute] of vitality").

Moreover, when the Legislature has intended to create a narrow exemption to the prohibitions in G.L. c. 268A, §20, it has done so within §20. See G.L. c. 268A, §§20(a) - (h) *et seq.* Although the Legislature has revisited §20 numerous times, it has not chosen to provide an exemption for wiring inspectors performing electrical work for town agencies.^{4/}

The prudent and plausible course is for the Commission to interpret the two statutes harmoniously so they may be enforced simultaneously.^{5/} *Houston*, 430 Mass. at 631 (Cowan, J., concurring) ("the more plausible course is to construe the legislative will as intending that the policies embraced in both statutes be enforced"); *City of Everett v. City of Revere*, 344 Mass. 585, 589 (1962) (same); *Green v. Wyman-Gordon Company*, 422 Mass. 551, 554 (1996) (same); 1A C.Sands, *Sutherland Statutory Construction* §23.10 (5th ed. 1993) ("Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its *consistent* operation with previous legislation") (emphasis in original). Accordingly, the "comprehensive nature of [G.L. c. 268A] must prevail over any limitations which might be read into [G.L. c. 166, §32A]." *Boston Housing Authority v. Labor Relations Commission*, 398 Mass. 715, 719 (1986).

Here, although the two statutes overlap, they can coexist. *Police Department of Boston*, 48 Mass. App. Ct. at 547; *McGrath v. Mishara*, 386 Mass. 74, 83 (1982), citing *Dodd v. Commercial Union Insurance Co.*, 373 Mass. 72, 75-78 (1977) ("[t]he mere fact that these statutes contain some overlapping prohibitions and remedies does not establish a legislative intent to preclude their concurrent application"). Importantly, our interpretation will not render

G.L. c. 166, §32A a “near nullity,” since its provisions will remain fully in effect.^{6/} *Green*, 422 Mass. at 557; *City of Everett*, 344 Mass. at 589.

We conclude, in a manner which reconciles and gives reasonable effect to both statutes, that in a city or town which adopts the provisions of G.L. c. 166, §32A, a wiring inspector may perform and be compensated for such work, provided that he complies with G.L. c. 268A, § 20. See *St. Germaine v. Pendergast*, 411 Mass. 615, 626 (1992); *G.J.T., Inc. v. Boston Licensing Board*, 397 Mass. 285, 293 (1986). Based on this conclusion, you must qualify for one of the §20 exemptions in order to perform electrical work for a Town agency.

Because you are a special municipal employee, two exemptions are available to you. If you do not, as wiring inspector, participate^{7/} in or have official responsibility^{8/} for any of the activities of the Town agency for which you perform electrical work, you simply have to file a disclosure with the Town Clerk.^{9/} If you do participate in or have official responsibility for any of the activities of the Town agency for which you perform electrical work, you must, in addition, receive the Board of Selectmen’s approval.^{10/}

DATE AUTHORIZED: May 22, 2000

^{1/}Section 20 of G.L. c. 268A applies to you as a municipal employee. G.L. c. 268A, The Board of Selectmen have classified the wiring inspector’s position as that of special municipal employee.

^{2/}The Board of State Examiners of Electricians regulation provides: “Restriction for Licensed Electricians: Any person licensed by the Commonwealth of Massachusetts, Board of State Examiners of Electricians in accordance with the provisions of M.G.L. c. 141 as a master electrician, journeyman electrician, or both, who functions as an Inspector of Wires, Wiring Inspector, Assistant Wiring Inspector or Deputy, either full-time, part-time or temporary, appointed pursuant to the provisions of M.G.L. c. 166, §32, as amended, shall not practice for hire, or engage in the business during the time that person holds such an appointment within the area over which such person is the authority enforcing the Massachusetts Electrical Code [].” 237 CMR, §4.08 (effective January 30, 1980). Five related bills were filed with the General Court to repeal or modify the effect of the regulation. See 1981 Senate Doc. Nos. 903, 938, 941, 942 and House Doc. No. 1840. The recommended draft of the Committee on Local Affairs, 1981 House Doc. No. 6720, was adopted by both legislative branches and enacted in unchanged form as a local acceptance bill.

^{3/}Letters from Selectmen and State Senators to the Committee on Local Affairs questioned the regulation’s breadth, saying: “It has become increasingly difficult for small communities to find appropriate and qualified individuals for . . . [t]he position of Wire Inspector Certain regulations governing Wire Inspectors have substantially reduced the numbers of candidates for that office in every small town”; “This new regulation . . . presents an unreasonable hardship on small communities throughout the Commonwealth. Electricians who formerly accepted the responsibilities of this position did so in many instances on a part-time basis, reserving the right to make a decent living engaging in private practice. Now unable to practice in the towns in which they act as Inspector, it is no longer feasible or profitable in many cases for electricians to assist communities in this role”; “Due to the nature of business in small towns, it is difficult for wiring and plumbing inspectors not to engage in business within the community as the majority of their customers are located within the immediate area.”

^{4/}*Contrast* G.L. c. 268A, §20(f), which provides an exemption “to a municipal employee if the contract is for personal services in a part-time, call or volunteer capacity with the police, fire, rescue or ambulance department of a fire district, town or any city with a population of less than thirty-five thousand inhabitants; provided, however, that the head of the contracting agency makes and files with the clerk of the city, district or town a written certification that no employee of said agency is available to perform such services as part of his regular duties, and the city council, board of selectmen, board of aldermen or district prudential committee approve the exemption of his interest from this section”

^{5/}If the Legislative intent is to allow wiring inspectors in towns that adopt G.L. c. 166, §32A to provide services not only to private clients but also to town agencies, it can amend the statute to expressly say so. See, e.g., G.L. c. 111, §23G.

^{6/}In comparison, the relationship between G.L. c. 166, §32A and G.L. c. 268A, §17, which generally prohibits a municipal employee, from receiving compensation from, or acting as agent or attorney for, anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest, provides an example of a later enacted statute's clear implication that it supercedes another statute. In *EC-COI-87-42*, the Commission considered whether G.L. c. 166, §32A provided, in essence, a statutory exemption to §17, thus allowing wiring inspectors to perform electrical work in the same town for non-municipal parties. Although G.L. c. 166, §32A is silent as to G.L. c. 268A, the Commission concluded that the Legislature intended to supercede §17 because the statute was enacted for the very purpose of allowing wiring inspectors to perform electrical work in their own towns. *Id.* Had the Commission concluded otherwise, G.L. c. 166, §32A would have been rendered a nullity. Moreover, G.L. c. 166, §32A addressed the very purpose of §17, divided loyalty, by requiring the town to appoint an assistant inspector to inspect the wiring inspector's work.

^{7/}"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

^{8/} "Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

^{9/}Section 20(c) applies "to a special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the clerk of the city or town a statement making full disclosure of his interest and the interests of his immediate family in the contract."

^{10/}Section 20(d) applies "to a special municipal employee who files with the clerk of the city, town or district a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the city council or board of aldermen, if there is no city council, board of selectmen or the district prudential committee, approve the exemption of his interest from this section."